Supreme Court, U.S.
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In the
Supreme Court of the United States

RONALD W. SKEDDLE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Hyde Amendment, 18 U.S.C. §3006A, statutory note, permits a criminal defendant to recover attorneys' fees from the Government if the position of the prosecution "was vexatious, frivolous, or in bad faith." In this case, although finding that the Government's legal theory was foreclosed by controlling precedent, to which defense counsel had alerted the prosecutors before trial, the Court of Appeals held that the Government's position was not "frivolous" because it was not "so clearly defective so as to lead us to suspect that the government was up to something nefarious."

As a consequence, this case presents the following question:

Is the Government's position "frivolous" for purposes of the Hyde Amendment if it is objectively barred by controlling precedent, of which the prosecution was on notice, even if not subjectively undertaken for a malicious or otherwise improper purpose?

PARTIES TO THE PROCEEDING

The only parties to this proceeding in the Court of Appeals were Ronald W. Skeddle, defendant-appellant, and the United States of America, plaintiff-appellee. No party to this case is a corporation.

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PETITION FOR A WRIT OF CERTIORARI

Ronald W. Skeddle respectfully petitions this Honorable Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (A29-A36) is unofficially reported at 45 Fed. Appx. 443, 90 A.F.T.R.2d 2002-6234. The opinion of the District Court (A1-A28) is unreported.[1]

JURISDICTION

The decision of the Court of Appeals was entered on August 29, 2002. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The Hyde Amendment, Pub. L. No. 105-119, §617, 111 Stat. 2440, 2519 (reprinted in the historical and statutory notes to 18 U.S.C. §3006A) provides in its entirety as follows:

> During fiscal year 1998 and in any fiscal year thereafter, the court, in any criminal case (other than a case in which the defendant is represented by assigned counsel paid for by the public) pending on or after the date of the enactment of this Act [Nov. 26, 1997], may award to a prevailing party, other than the United States, a reasonable attorney's fee and other litigation expenses, where the courts finds that the position of the United States was vexatious, frivolous, or in bad faith, unless the court finds that special circumstances make such

[1] References preceded by "A" are to the Appendix to this Petition; references preceded by "CAA" are to the Joint Appendix filed in the Court of Appeals.

an award unjust. Such awards shall be granted pursuant to the procedures and limitations (but not the burden of proof) provided for an award under section 2412 of title 28, United States Code. To determine whether or not to award fees and costs under this section, the court, for good cause shown, may receive evidence ex parte and in camera (which shall include the submission of classified evidence or evidence that reveals or might reveal the identity of an informant or undercover agent or matters occurring before a grand jury) and evidence or testimony so received shall be kept under seal. Fees and other expenses awarded under this provision to a party shall be paid by the agency over which the party prevails from any funds made available to the agency by appropriation. No new appropriations shall be made as a result of this provision.

STATEMENT OF THE CASE

The Underlying Transactions

In 1990, Libbey-Owens Ford Co. ("LOF") decided to outsource its computer operations. Ronald Skeddle, who was then the president and chief executive officer of LOF, along with two LOF vice-presidents (collectively "the former LOF executives"), were interested in personally participating in these transactions, and therefore consulted legal counsel to learn if such participation could be done lawfully while keeping their involvement confidential from LOF. (A19). The lawyers advised the former LOF executives that participating in an undisclosed self-interested transaction would be lawful as long as the transaction was fair to LOF. (*Id.*)

To accomplish the goal of participating in these transactions yet keeping that participation confidential, the lawyers created a corporate structure which included: (1) a subchapter

C corporation which contracted with LOF to provide computer services to LOF; (2) an intermediate set of subchapter S corporations through which some of the profits from the outsourcing contract passed; and (3) a set of three subchapter S corporations (one controlled by each of the former LOF executives). (A19-20). The S corporation controlled by Mr. Skeddle was the SWR Corporation ("SWR"). (A20).

As part of the legal and accounting work performed for Mr. Skeddle, the lawyers and accountants placed the ownership of SWR in the hands of Mr. Skeddle's five children. (A20). This was done because Mr. Skeddle's personal tax returns were prepared by the same accounting firm that performed LOF's tax work, and if SWR was owned by Mr. Skeddle, LOF's accountants would learn of his ownership, thereby destroying the confidentiality he sought. (*Id.)*

The Criminal Charges

Despite the former LOF executives' desire to keep their interests in these transactions confidential, LOF learned of these undisclosed business interests in May of 1993, and dismissed the former LOF executives from their respective positions. Shortly thereafter, the United States Attorney's Office for the Northern District of Ohio commenced a criminal investigation, focusing on the former LOF executives' activities in their corporate capacities. In June 1995, a federal grand jury named Mr. Skeddle and eight others as defendants in a 274-count indictment, later replaced by a 313-count superseding indictment, charging Mr. Skeddle and his co-defendants with conspiracy, mail and wire fraud, money laundering and tax fraud. The charges centered on the allegations that Mr. Skeddle and his co-defendants had participated in fraudulent self-dealing in violation of fiduciary and other contractual duties owned to LOF. (A21, 30-31).

Prior to the trial, the district court severed the tax fraud charges from the remaining charges. (A21). After a three and a half month jury trial in the United States District Court for the Northern District of Ohio, all defendants were acquitted of all other charges. (A21).

The Tax Fraud Charges

After the acquittal at the first trial, the Government elected to try Mr. Skeddle and two other defendants on the severed tax charges. (A21). Mr. Skeddle was ultimately tried on two counts of filing false tax returns for SWR, allegedly in violation of 26 U.S.C. §7206 (1, 2). (CAA 230-31).

These counts alleged that SWR's tax returns were false in three material respects: (i) the returns represented that the five Skeddle children were the owners of SWR when in fact the five children were not the owners; (ii) the returns represented that SWR was in the business of "Consulting" with a service of "Computer Services" when in fact SWR was not in that business and did not provide that service; and (iii) the returns claimed various business deductions when in fact it was not entitled to claim any such deductions. (A22). Under this third allegation, the Government asserted two theories: (a) since SWR was not conducting any business whatsoever, it was not entitled to take any business deductions, and (b) in particular, the deduction for "salary" on the SWR return, which salary was purportedly paid to the five Skeddle children, was fraudulent. These were the charges against Mr. Skeddle when the case proceeded to trial.

The Trial on the Tax Fraud Charges

The trial on the tax fraud charges began on April 19, 1999. It ended as to Mr. Skeddle on May 26, 1999, when the district court (Hon. James G. Carr, U.S.D.J.) entered judgments of acquittal under Rule 29 of the Federal Rules of Criminal Procedure.

1. The Unfounded "Ownership" Allegations

The Government's principal position with respect to Mr. Skeddle was that SWR's tax returns were false in that they identified the five Skeddle children as the owners of SWR. According to the Government, Mr. Skeddle was the real owner of SWR, the income to SWR was really his, and therefore his ownership — not that of his children — should have been reflected on the SWR tax returns. (A22; CAA 920-72).

During jury selection, Government counsel for the first time alerted Mr. Skeddle that the Government intended to introduce evidence of how SWR's funds were expended in order to seek to prove that the SWR return falsely reported the five Skeddle children as the owners of SWR. According to Government counsel, Mr. Skeddle spent all the money received by SWR for Mr. Skeddle's personal purposes, and this evidence would demonstrate that the Skeddle children were not the true owners of SWR. (CAA 966, 979).

In response to the Government's proffer, counsel to Mr. Skeddle alerted the Government that the Government's theory was not legally viable because the Skeddle's children were in fact the owners of SWR and the statement in the SWR tax return was therefore literally true. (A22; CAA 966). Counsel stated that "the children were [the] owners [of SWR]. They

were issued the shares; their names are on the IRS forms. . . . They were the true owners. That's a fact." (*Id*). Mr. Skeddle's counsel reiterated this position on the day of opening statements. (CAA 979).

The bulk of the prosecution's evidence at trial showed that Mr. Skeddle controlled the funds received by SWR. On cross-examination of the Government's witnesses, however, Mr. Skeddle's counsel offered irrefutable documentary proof that the Skeddle children were in fact the owners of SWR. (CAA 1119, 1124).

After the government rested, the defendants moved for judgments of acquittal pursuant to Fed. R. Crim. P. 29. Counsel to Mr. Skeddle for the third time renewed his argument that the Government's "ownership" theory was invalid as a matter of law since the alleged false statement on the SWR returns regarding ownership was in fact true:

> MR. SOMMER: As a legal matter they are the owners. The SWR return reported they were the legal owners. There's no dispute between the parties that those shares were, in fact, issued to the children. The government has not disputed or presented any evidence that that was not exactly the legal form. In fact, there is evidence in the record that confirms it. . . . Once those shares of SWR were issued to the children, there was a legal obligation to report their pro rata share of income not only to their tax returns . . . but on the K-1s that were part of the SWR return. As a result, the SWR returns reflecting the children as shareholders is literally true, substantively true, and it absolutely in no way is false.

(CAA 993-94).

In response, Government counsel finally conceded the truth of what Mr. Skeddle's counsel had advised the Government before the jury had been impaneled — that the Government's "ownership" theory was not a legally viable theory of prosecution:

> [W]e want to concede another allegation that I guess credit goes to Mr. Sommer on this one. This would relate to Counts [17 and 18] and his argument that the allegation that the Skeddle children were the true owners is a literally true statement by virtue of Ohio law. We have taken a look at those cases in the Sixth Circuit that deal with the false statement statutes, and we just do not see how a rational juror could conclude that the children were not the true owners based on the operation of Ohio State law and the fact shares were actually issued in their names.

(CAA 997).

The Government offered no explanation of why this concession had not been made sooner. Significantly, nothing occurred in the course of the Government's case-in-chief to render the Government's theory legally infirm. That theory, rather, was defective on the day of the indictment; it was defective on the day defense counsel gave notice to the Government in advance of trial of that defect; and it remained defective throughout the trial as the Government called witness after witness, and presented scores of exhibits to the jury, all in support of its invalid charge (and all of which would have otherwise been inadmissible).

The district court dismissed those portions of the indictment based on these charges. (A22).

2. The Unfounded "Consulting" Allegations

The Government's second allegation relating to Mr. Skeddle was that the SWR returns were false in that they identified the principal business activity of SWR as "Consulting," with a product or service of "Computer Services." According to the Government's theory of the case, SWR performed no consulting whatsoever. (CAA 294).

Immediately after opening statements, defense counsel told the district court that the Government would be unable to present any evidence supporting this theory and that, in fact, evidence in the Government's own possession demonstrated that SWR had performed substantial consulting services. (CAA 973-76).

Such evidence of consulting services by SWR was, in fact, presented both on cross-examination of the Government's witnesses and on the defense case. (CAA 658-738, 739-892, 1110-13). At the close of all the evidence, counsel for the Government conceded that Mr. Skeddle had performed consulting services. (CAA 1003-1004). The district court therefore granted Mr. Skeddle's motion for judgment of acquittal as to this theory as well. (CAA 335).

3. The Unfounded "Salary" Allegations

The Government's third theory, as set forth in a Bill of Particulars, was that SWR's tax returns were false because SWR had engaged in no business at all, and was therefore not entitled to claim any deductions. (CAA 294). The evidence that SWR had, in fact, engaged in the consulting business doomed this theory as well, and the district court again granted a motion for judgment of acquittal as to that theory. (CAA 330).

The Government alternatively argued, in its opening statement, that the salary deductions on the SWR returns were fraudulent because no salary had been paid to Mr. Skeddle's children. (CAA 967, 969). At trial, however, documentary evidence — which the defense had received *from the Government* — demonstrated conclusively that the children had, in fact, received all of the salary claimed. (CAA 1139-59, 1116, 1120, 1130, 1131).

The Government then changed its theory in mid-trial and claimed that the salary deductions were nonetheless fraudulent because the children had not performed any services in exchange for these salaries. (CAA 1005). The Government, however, was unable to present any evidence that Mr. Skeddle *knew* that the Internal Revenue Code required that salaries be paid only to employees who actually performed services. Because only "willful" violations of the Internal Revenue Code are punishable under 26 U.S.C. §7606(1) — which requires the prosecution to prove that the defendant knew of a legal duty and intentionally violated that duty, *Cheek v. United States*, 498 U.S. 192, 201 (1991) — this failure of proof led to the district court's granting of Mr. Skeddle's motion for a judgment of acquittal as to these charges as well. (CAA 335-36).[2]

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[2] In an effort to salvage this theory, the prosecutor misrepresented the record to the district court, claiming that there had been testimony that Mr. Skeddle had been advised on this requirement of the tax law. (CAA 1062-63). Defense counsel pointed out that this testimony related to Subchapter C corporations, not Subchapter S corporations; the prosecutor insisted that the testimony had, in fact related to S Corporations. (CAA 1074-77). The district court reviewed the transcript and determined that the prosecutor's position was not supported by the record. (CAA 335-36).

The Hyde Motion in the District Court

After his acquittal on all charges, Mr. Skeddle moved to recover his attorneys' fees and costs under the Hyde Amendment. The Government opposed that motion, and, by order dated January 31, 2000, the district court denied the motion. (A1-28).

According to the District Court, while it was true that the Government was put on notice by defense counsel that its "ownership" theory was legally deficient, and that a "[m]ore careful analysis of the law and evidence might have shown the Government earlier on that it could not prevail," the Government's "failure" in this regard did not render its prosecution frivolous, vexatious or in bad faith. (A 25). Rather, the district court found that the Government was guilty only of "simple negligence or benign prosecutorial misjudgment." (A 26) (quoting *United States v. Peterson*, 71 F. Supp. 2d 695, 698 (S.D. Tex. 1999)).

As to the Government's "consulting" and "salary" theories, the District Court found that the Government's position was not frivolous because Mr. Skeddle's business efforts on behalf of JWR had been "modest." (A 25).

The Decision of the Court of Appeals

On appeal, the Sixth Circuit affirmed the District Court's denial of the Hyde Amendment motion. (A29-36). It found that the Government's "ownership" theory, while foreclosed as a matter of law, was "not so clearly defective as to lead us to suspect that the Government was up to something nefarious." (A35).

The Court of Appeals similarly found the Government's "consulting" theory "was not so patently without merit that we must agree that the Government had to be aware of its defects" (A 35) and that its "salary" theory "does not seem all that absurd." (*Id.*)

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS

The Sixth Circuit's decision conflicts with that of every other appellate court to have considered the "frivolous" prong of the Hyde Amendment. Unlike other circuits, which have held that a legal position is "frivolous" if it is *objectively* without any arguable merit, the Sixth Circuit engrafted on an additional, *subjective* component, that the Government must also be "up to something nefarious." (A 35).

This decision directly contradicts the holding of the Ninth Circuit in *United States v. Braunstein*, 281 F.3d 982 (9th Cir. 2002), holding that a criminal prosecution is "frivolous" for purposes of the Hyde Amendment if its "was foreclosed by binding precedent or . . . obviously wrong." 281 F.3d at 995 (quoting *United States v. Gilbert*, 198 F.3d 1293, 1304 (11th Cir. 1999)).

Braunstein reached the opposite conclusion to the Sixth Circuit's decision in this case, on remarkably similar facts. The defendant in *Braunstein* was prosecuted on wire fraud and related charges, all based on the theory that he had defrauded Apple Computer, Inc., by buying products designed for sale in Mexico and re-selling them in the United States. 281 F.3d at 995. Before trial, defense counsel alerted the prosecution to evidence demonstrating that Apple knew such "gray market" goods were routinely sold in the United States

and acquiesced in that practice. 281 F.3d at 996-97. The Government nonetheless proceeded with the prosecution, until the defense obtained by subpoena documents proving its theory. 281 F.3d at 991. The Government then moved to dismiss the indictment. *Id.* The district court dismissed the indictment but denied the defendant's motion for attorneys' fees under the Hyde Amendment. 281 F.3d at 991-92. The Ninth Circuit reversed, holding that the Government's position "was so obviously wrong as to be frivolous," 281 F.3d at 996, especially because "the AUSA had in her possession [before trial] the letter from Braunstein's attorney which detailed the defense to the fraud charges." *Id.*

Similarly, in this case, the Government's "ownership" theory was inconsistent with controlling decisions of this Court and of the Sixth Circuit (*see* discussion at 15-16, *infra*), and defense counsel had alerted the prosecutors to that authority before trial. (A22). The Government's other two theories were belied by evidence which was in the prosecutor's possession before trial, and to which defense counsel had also alerted the prosecutors. (*See* pp. 8-9, *supra*). These two theories were thus also frivolous. *Braunstein*, 281 F.3d at 996 (theory of prosecution is "frivolous" if prosecutors had in their possession evidence rebutting that theory, and defense counsel had called the existence of that evidence to the prosecutor's attention).

The Sixth Circuit nonetheless refused to award fees under the Hyde Amendment because the Government's position, although clearly wrong and foreclosed by binding precedent, did not "lead [the Sixth Circuit] to suspect that the Government was up to something nefarious." (A35). Not only does this interpretation of the statute directly contradict *Braunstein*, but every other Circuit to have analyzed the "frivolous"

prong of the Hyde Amendment has also held that that term refers only to an objective lack of merit, not to subjective bad faith or a "nefarious" purpose.

In *United States v. Knott*, 256 F.3d 20 (1st Cir. 2001), *cert. denied*, 534 U.S. 1127 (2002), the First Circuit reviewed an award of attorneys' fees which had been made solely under the "vexatious" prong of the statute. 256 F.3d at 28. In remanding the fee award for reconsideration, the First Circuit held that the "vexatious" and "frivolous" prongs of the Hyde Amendment were not synonymous, and that the term "frivolous" referred to "a position so obviously wrong that no reasonable prosecutor could have supported it" while the term "vexatious" referred to "bad faith or improper motive." 256 F.3d at 29-30. *Accord, United States v. Gilbert*, 198 F.3d 1293, 1304 (11th Cir. 1999) (Government's position is "frivolous" under the Hyde Amendment if "foreclosed by binding precedent"); *see also In re 1997 Grand Jury*, 215 F.3d 430, 436 (1st Cir. 1997) (denial of fees under Hyde Amendment upheld where defendant could not demonstrate "that the Government lacked a reasonable basis for its prosecution").

II. THE DECISION BELOW MISCONSTRUES THE HYDE AMENDMENT

By adding a subjective component to the "frivolous" prong of the Hyde Amendment, the decision below not only contradicts the views of every other appellate court to have analyzed the statute, it also violates basic rules of statutory construction and fails to carry out the purpose of the statute.

The most basic maxim of statutory construction requires that words not defined in the statute itself to be given their ordinary meaning. *E.g., Chapman v. United States*, 500 U.S. 453, 462 (1991). The word "frivolous" has always been interpreted by this Court and other courts to refer to a litigating position which "lacks an arguable basis either in

law or in fact," *Neitzke v. Williams*, 490 U.S. 319, 325 (1989) (interpreting 28 U.S.C. §1915(d) [now § 1915(e)(2)(B)(i)]), "even though not brought in subjective bad faith." *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978) (fee shifting under 42 U.S.C. §2000e-5 (k)). *Accord*, *Anders v. California*, 386 U.S. 738, 744 (1967) ("frivolous" appeal is one in which no "legal points [are] arguable on their merits"); *Orr v. Bank of America*, 285 F.3d 764, 784 n.34 (9th Cir. 2001) (construing FRAP 38); *Taylor v. Johnson*, 257 F.3d 470, 473 (5th Cir. 2001) (28 U.S.C. §1915 (e)(2)(B)(ii)); *Jansen v. Aaron Process Equipment Co.*, 207 F.3d 1001, 1005 (7th Cir. 2000) (FRAP 38); *see also* F.R. Civ.P. 11(b)(2).

The Sixth Circuit's insertion of a "nefarious purpose" requirement into the term "frivolous" also renders that term wholly superfluous, because the statute already includes the terms "vexatious" and "in bad faith," both of which encompass the element of bad purpose. Statutes should not be construed so as to make any term redundant. *E.g., Gustafson v. Alloyd Co.*, 513 U.S. 561, 574 (1995); *Ratzlaf v. United States*, 510 U.S. 135, 140 (1994).

The Sixth Circuit's interpretation of the statute also flies in the face of the statute's purpose, which was to apply to the prosecution the same disincentive to file meritless criminal cases as already exists in civil cases. *See* 28 U.S.C. §2412. As Representative Henry Hyde said in introducing the legislation, "[t]his is about as simple a concept as there is. We have had it and we have been satisfied with it in civil litigation. I am simply applying the same [standard] to criminal litigation." 143 Cong. Rec. H7793 (Sept. 24, 1997).

III. THE GOVERNMENT'S PROSECUTION OF MR. SKEDDLE WAS FRIVOLOUS

Applying the correct legal standard, the Government's prosecution of Mr. Skeddle was clearly frivolous, because it was "foreclosed by binding precedent." *United States v. Braunstein*, 281 F.3d 982, 995 (9th Cir. 2002); *United States v. Gilbert*, 198 F.3d 1293, 1304 (11th Cir. 1999). Even the court below acknowledged as much. (A35).

The Government's position on its chief theory of prosecution was that Mr. Skeddle had violated 26 U.S.C. §7206(1) by causing SWR Corp. to file tax returns which listed Mr. Skeddle's children as the corporation's shareholders. It is undisputed, however, that Mr. Skeddle's children *were* the shareholders of SWR; the shares had been issued in their names and they were the shareholders of record on the corporation's books. *See United States v. Pirro*, 212 F.3d 86, 89-91 (2d Cir. 2000) (corporate tax return must list names only of shareholders of record, not of others with a beneficial "ownership interest"; dismissal of charge under 26 U.S.C. §7206(1) affirmed).

Section 7206(1) is, by its own terms, a perjury statute. *United States v. Reynolds*, 919 F.2d 435, 437 (7th Cir. 1990) (Easterbrook, J.), *cert. denied*, 499 U.S. 942 (1991). The statute punishes the making of a false statement on a tax return if the return is one which "contains or is verified by a written declaration that is made under the penalties of perjury."

As defense counsel informed the prosecutor before trial, it has long been held, by this Court, the Sixth Circuit and other courts, that no one may be prosecuted under a perjury or false statement statute for making a statement which is literally true, even if that statement was intended to mislead or conceal. *E.g., Bronston v. United States*, 409 U.S. 352 (1973) (perjury prosecution under 18 U.S.C. §1621); *United States*

v. Gatewood, 173 F.3d 983, 988 (6th Cir. 1999) (18 U.S.C. §1001); *United States v. Reynolds*, 919 F.2d 435, 437 (7th Cir. 1990) (26 U.S.C. §7206(1)), *cert. denied*, 499 U.S. 942 (1991); *United States v. Gahagan*, 881 F.2d 1380, 1382-84 (6th Cir. 1989) (18 U.S.C. §1001).

Here, it is undisputed that Mr. Skeddle's statement on the SWR tax return, that his children were the owners of SWR Corporation, was literally true. The Government knew that fact before trial; and, before trial, defense counsel drew the Government's attention to the controlling precedent precluding Mr. Skeddle's prosecution. Only at the close of trial, however, did the Government "concede" that the statement "that the Skeddle children were the true owners is a literally true statement" and that the prosecution's position was thus precluded by "those cases in the Sixth Circuit that deal with the false statement statutes." (CAA 997).

The Government thus conceded at the close of trial what it should have admitted all along — that its theory of prosecution of Mr. Skeddle was "foreclosed by binding precedent." Similarly, as discussed above, the Government's "consulting" theory and its initial "salary" theory were contradicted by evidence it had had in its possession even before the start of the trial. Its second "salary" theory contradicted its original theory — thus demonstrating the frivolity of the earlier theory — and was itself unsupported by the evidence (reducing the prosecutor to misrepresenting the record).

Such a prosecution is "frivolous" within the meaning of the Hyde Amendment, properly construed, and the Sixth Circuit's contrary interpretation of the statute is erroneous.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Dated: November 27, 2002

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

FILED
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Northern District of Ohio

United States of America,

Plaintiff,

-v-

Ronald W. Skeddle,

Defendant

Case No. 3:95CR736

ORDER

This is a criminal case in which the defendant, Ronald W. Skeddle, who has been acquitted following two trials (the first, on charges of mail and wire fraud and money laundering and the second on charges of tax fraud),[1] has filed motion under the "Hyde Amendment" (Public Law No. 105-119, § 617, 111 Stat. 2440, 2519 (enacted Nov. 26, 1997) to recover reasonable attorneys' fees, costs, and expenses incurred in his defense preceding and during the second trial. For the reasons that follow, the motion is denied.

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[1] Defendant Skeddle was initially charged in a single indictment on charges of mail and wire fraud, money laundering, and tax fraud. The charges arose from a scheme whereby Skeddle, former President and CEO of Libbey-Owens-Ford Company, and two LOF Vice-Presidents obtained approximately $9,000,000 from undisclosed self-dealing with LOF. The tax fraud charges against him and some of his codefendants were severed, and the case proceeded to trial on the mail and wire fraud and money laundering charges against Skeddle and eight codefendants. After all acquittal of all defendants on those charges, Skeddle and two other defendants were charged with tax fraud in a superseding indictment.

In its entirety, the Hyde Amendment states:

> During fiscal year 1998 and in any fiscal year thereafter, the court, in any criminal case (other than a case in which the defendant is represented by assigned counsel paid for by the public) pending on or after the date of the enactment of this Act [Nov. 26, 1997], may award to a prevailing party, other than the United States, a reasonable attorney's fee and other litigation expenses, where the court finds that the position of the United States was vexatious, frivolous, or in bad faith, unless the court finds that special circumstances make such an award unjust. Such awards shall be granted pursuant to the procedures and limitations (but not the burden of proof) provided for an award under section 2412 of title 28, United States Code. To determine whether or not to award fees and costs under this section, the court, for good cause shown, may receive evidence ex parte and in camera (which shall include the submission of classified evidence or evidence that reveals or might reveal the identity of an informant or undercover agent or matters occurring before a grand jury) and evidence or testimony so received shall be kept under seal. Fees and other expenses awarded under this provision to a party shall be paid by the agency over which the party prevails from any funds made available to the agency by appropriation. No new appropriations shall be made as a result of this provision.

18 U.S.C. S 3006A Statutory Note.

Section 2412 of Title 28, the Equal Access to Justice Act (EAJA), to which the Hyde Amendment refers, provides in pertinent part:

> (b) unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to . . . costs . . ., to the prevailing party in any

civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

* * * * *

(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to . . . costs . . ., incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency

upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

* * * * *

(2) For the purposes of this subsection —
(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of $125 per hour unless the court determines that an increase in the cost of living or a special favor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.);
(B) "party" means (i) an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed, . . .

Under § 2412(b) of EAJA, a party who prevails against the government may be awarded reasonable fees and costs "to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award." Under § 2412(d), in contrast, the prevailing party shall receive an award of fees, regardless of the existence of an independent common law or federal statutory basis for such award, "unless the court finds

that the position of the United States was substantially justified or that special circumstances make an award unjust."[2]

Where an award is made under § 2412(d), the prevailing party's attorney's fee is limited to an hourly rate of $125. No award may be made under § 2412(d) if the net worth of the prevailing party at the time the action was filed exceeded $2,000,000.

Courts interpreting EAJA in civil cases have held that a prevailing party may seek an award under either § 2412(b) or § 2412(d). *See Hyatt v. Shalala*, 6 F.3d 250, 254 (4th Cir. 1993); *American Hosp. Ass'n v. Sullivan*, 938 F.2d 216, 219 (D.C. Cir. 1991); *Hardin v. Apfel*, 63 F. Supp.2d 1288, 1289 (D. Kan. 1999).

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[2] One commentator has described the differences between § 2412(b) and § 2412(d):

> Subsection (b) makes the federal government liable for attorney's fees under common-law and statutory fee-shifting exceptions to the American Rule on the same basis as any other party. In effect, the statute places the government on "equal footing" with private parties in terms of liability for attorney's fee awards. Subsection (b) waives the sovereign immunity of the federal government, but "does not create any new substantive rights to attorney's fee awards." To collect a fee, the litigant must still identify another statute or common-law doctrine that provides an exception to the general bar on fee-shifting per the American Rule.
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> The second fee-shifting . . ., Subsection 2412(d) . . . not only waives the sovereign immunity of the United States, but also creates a new basis for an award of attorney's fees beyond other common-law or statutory exceptions to the American Rule. Subsection (d) is broad in that it applies to most civil actions, but it is also limited in that it allows an attorney's fee award only when the government's position is found to be unreasonable.
>
> Under Subsection (d), in addition to court costs, the court must award attorney's fees to any party who meets specified eligibility qualifications.

Gregory C. Sisk, *The Essentials of the Equal Access To Justice Act: Court Awards of Attorney's Fees for Unreasonable Government Conduct (Part One)*, 55 La. L. Rev. 217, 223 (1994).

Although the Hyde Amendment incorporates EAJA, the provisions of the Hyde Amendment differ from EAJA in two respects: first, in place of the "substantially justified" standard of EAJA, the Hyde Amendment imposes a "vexacious, frivolous, or in bad faith" standard, and, second, the burden of proof under the Hyde Amendment is on the defendant.

According to the defendant Skeddle, he, like a prevailing civil litigant under EAJA, can recover under the Hyde Amendment solely on the basis of the authority for such recovery found in § 2412(b), without regard to the requirements and limitations imposed by § 2412(d). The government argues in response that, to recover under the Hyde Amendment, the defendant must meet those requirements and limitations, including the requirement of having less than $2,000,000 net worth when the action was filed and the limitation on compensation to $125 per hour.

A. Recovery Under The Hyde Amendment is Controlled by § 2412(d) of EAJA

The Hyde Amendment states that an award "shall be granted pursuant to the procedures and limitations (but not the burden of proof) provided for an award under section 2412." The parties each assert, and other courts have found, *United States v. Holland*, 34 F. Supp.2d 346, 357, *vacated in part on reconsideration*, 48 F. Supp.2d 571 (E.D. Va. 1999); *United States v. Reyes*, 16 F. Supp.2d 759, 760 (S.D. Tex. 1998), that the Hyde Amendment (and thus, this provision) is not ambiguous.[3]

The court in *United States v. Holland*, 48 F.Supp.2d 571, 575 (E.D. Va. 1999), was, moreover, undoubtedly correct when it observed that, "'absent a clear manifestation of

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[3] The Eleventh Circuit referred to the "plain meaning" of the Amendment in *United States v. Gilbert*, — F.3d —, 1999 WL 1258983, *3 (11th Cir. (Fla.) Dec 28, 1999). Its focus, however, was on the terms, vexatious, frivolous, and bad faith, rather than other portions of the Amendment.

intent, a newly-enacted or revised statute is presumed to be harmonious with existing law and its judicial construction.'. In enacting the Hyde Amendment, Congress was presumed to have knowledge of the existing case law allowing petitioners under the EAJA to proceed under Section 2412(b) or (d)." (*citing United States v. Langley*, 62 F.3d 602, 605 (4th Cir. 1995) (en banc)). The court also observed in *Holland*, 34 F. Supp.2d at 357, that, "[h]ad Congress intended to limit the applicant's rights to those granted by section 2412(d), it could have said so. There is no reason to believe the Hyde Amendment intended to confer lesser rights upon criminal defendants than the EAJA conferred upon civil litigants." The mere fact that the parties disputed the interpretation to be given to the Hyde Amendment was not sufficient, in the view of court in *Holland*, to justify a finding that the statute was ambiguous. *Id.*

Although Congress did not specify expressly that an application under the Hyde Amendment had to conform to § 2412(d), the Amendment's meaning is not determined simply by asserting the Congress could have said directly that § 2412(d) had to be satisfied. The problem of construction raised by the Amendment is the fact that Congress did not incorporate EAJA in toto into criminal cases. Instead, it switched the burden and increased the standard of proof while imposing the "procedures and limitations" of EAJA on Hyde Amendment awards. Not having chosen to incorporate the limitations of § 2412(d) directly, Congress at best left the meaning of the Amendment opaque and subject to dispute and differing interpretations.

In simplest terms, Congress either meant to restrict Hyde Amendment awards to § 2412(d) or it did not. All that can definitely be said is that it did not express its intent one way or the other. This leads me to the conclusion that the Amendment's reference to the "procedures and limitations of"

§ 2412 is ambiguous. Recourse, accordingly, may be had to the Amendment's legislative history.

Contrary to the reading of that history in *Holland*, 34 F.Supp. at 357 n.18 ("the legislative history seems to favor a criminal defendant having the same right to elect to proceed under section 2412(b) as a civil litigant") (dictum), I find ample indication that Congress sought to be more restrictive with fee awards in criminal cases than in civil cases.

The Eleventh Circuit, noting in *Gilbert* that "[t]he legislative history of the provision is far from extensive." --- F.3d at ---, nonetheless examined the legislative background to the Hyde Amendment in some detail. The provision had its origin in the distress felt by some members of Congress about the unsuccessful prosecution of a former colleague, Joseph McDade, on federal bribery and racketeering charges. *Id.* at — (*citing* Elkan Abramowitz & Peter Scher, *The Hyde Amendment: Congress Creates a Toehold for Curbing Wrongful Prosecution*, 22 Champion, Mar. 1998, at 23).

In response to a proposal by Rep. John Murtha that members of Congress and their staffs who successfully defend themselves against federal criminal prosecutions be reimbursed, Representative Henry Hyde, Chairman of the House Judiciary Committee, offered an amendment to an appropriations bill, whereby all prevailing federal criminal defendants could apply for reimbursement. In addition, Hyde's proposal was patterned on EAJA. — F.3d at --- (*citing* 143 Cong. Rec. H7786-04, H7791 (Sept. 24, 1997) (statement of Rep. Hyde)).

As originally proposed by Rep. Hyde, the "Amendment would have allowed the award of attorney fees and costs to any federal criminal defendant who prevailed against the government, unless the government showed that its position in the prosecution had been 'substantially justified.'" *Id.* at ----. Even at this stage, Hyde's comments suggest that he

was thinking of a more limited approach in criminal cases; namely, one that was directed toward affirmative misconduct on the government's part:

> What if Uncle Sam sues you, charges you with a criminal violation, even gets an indictment and proceeds, but they are wrong. They are not just wrong, they are willfully wrong, they are frivolously wrong. They keep information from you that the law says they must disclose. They hide information. They do not disclose exculpatory information to which you are entitled. They suborn perjury . . . [U]nder my amendment . . . , [if the government] cannot prove substantial justification after the case is over, and the verdict is not guilty, then the prosecution pays something toward the attorney's fees of the victim.

Id.

In any event, Rep. David Skaggs objected to the Hyde proposal on the basis that it was offered without hearings, and, as well, because it did not require the government's conduct to be "malicious" or "abusive". *Id.* at ---- (*citing* 143 Cong. Rec. H7786-04, H7791-92 (Sept. 24, 1997) (statement of Rep. Skaggs)). Skaggs pointed out that the heightened standard referenced by Hyde in his remarks was not included in the text of his proposal. *Id.* (*citing* 143 Cong. Rec. H7792). Others expressed concern about the Amendment's "chilling effect" on federal prosecutions, particularly those involving reluctant witnesses. *Id.* at ---- (*citing* 143 Cong. Rec. H7793 (statement of Rep. Rivers)).

The Administration also forcefully opposed the "substantial justification standard," stating that such standard for awarding fees "'would have a profound and harmful impact on the Federal criminal justice system.'" *Id.* at ---- (*citing* 143 Cong. Rec. at H7792). Other objections from the administration and the Justice Department included concerns

about additional litigation, increased demand on scarce prosecutorial resources, interposition of courts into areas of prosecutorial discretion, and the deterrent effect of the Amendment on the pursuit of legitimate charges. *Id.* at ---- (*citing* Elkan Abramowitz, The Hyde Amendment and Wrongful Federal Prosecutions, N.Y.L.J., Jan. 6, 1998, at 3; Mark Johnson, Reimbursement Bill Opposed by Top Prosecutors, Tampa Trib., Nov. 3, 1997, at 3.).

The House passed the Hyde Amendment; the Senate, however, declined to adopt the Amendment in the form in which it had come to it from the House. The Conference Committee, accepting a Department of Justice proposal, replaced the EAJA "substantial justification" language with a standard allowing a prevailing party to recover fees only if the government's "'action was without foundation, or was initiated vexatiously, frivolously, or in bad faith.'" ---- F.3d at ---- (*citing* the Firearms Owners' Protection Act of 1986, 18 U.S.C. §924(d)(2)(B)). In addition, the Conference Committee added the proviso, found in the Amendment as adopted, that the court had discretion to decline to award fees if "the court finds that special circumstances make such an award unjust." *Id.* at ----.

These changes did not satisfy all congressional apprehensions. Even though the suggestion to adopt the "without foundation, or [ ] initiated vexatiously, frivolously, or in bad faith" standard originated in the Justice Department, "some members of Congress were still concerned that standard would be too easy to meet." *Id.* at ----. This led to two changes in the Conference Committee draft. The first change was to include the provision that "awards [of attorney fees and expenses] shall be granted pursuant to the procedures and limitations (but not the burden of proof) provided for an award under [the EAJA]."

The second change was "to narrow the scope of the Hyde Amendment by deleting from its description of prosecutions which would justify an award those that were brought 'without foundation.'" *Id.* at ---- (*citing* T.R. Goldman, Spending Bill Alters Legal Landscape, Legal Times, Nov. 17, 1997, at 1; H.R. Conf. Rep. No. 104-405, at 193-94 (1997), reprinted in 1997 U.S.C.C.A.N. 2941, 3044-45). As a result of this deletion, according to the Eleventh Circuit in *Gilbert*:

> a criminal defendant seeking fees [must] show more than that the prosecution had been without foundation. The "more" a defendant would be required to show is reflected in the final language of the provision, as it was enacted into law, which provides that attorney fees may be awarded where "the court finds that the position of the United States was vexatious, frivolous, or in bad faith, unless the court finds that special circumstances make such an award unjust."

Id. at ----.

Reviewing the path taken by the Hyde Amendment from original proposal to final enactment, the court in *Gilbert* stated, "[I]n response to concern that the initial version of the Hyde Amendment swept too broadly, the scope of the provision was curtailed significantly." *Id.* at ----. In enacting the Amendment, Congress eschewed congruence between its terms and those of EAJA. Instead, as shown by the legislative history and reflected in the Amendment's wording, it was made more difficult for prevailing defendants in criminal cases to recover fees. Even where the government's case had been without foundation, fees were not to be awarded absent the additional showing of vexatiousness, frivolity, or bad faith.

In light of this legislative history, I am persuaded that Congress, when it included the language, "procedures and limitations" of EAJA, intended to include the procedures and

limitations found in § 2412(d). That is the only provision in EAJA, as noted in *Holland*, 34 F.Supp.2d at 358, which contains procedural requirements. Section 2412(d) is, as well, the only subsection containing express limitations, such as that placed on the amount of recovery and the disqualification of parties with net worth greater than $2,000,000.

Another district court has recently reached the conclusion that I reach here: namely that § 2412(d) controls applications under the Hyde Amendment for recovery of fees and costs in criminal cases. *United States v. Peterson*, 71 F.Supp.2d 695, 699 (S.D. Tex. 1999). The court recited several reasons in support of its decision that § 2412(d) had to be satisfied before it could award fees under the Hyde Amendment:

> First, a plain reading of the statutory language requires this conclusion. To adopt [the defendant's] view of § 2412(b) would require the Court either to ignore and read out of § 2412(b) the clause, "under the terms of any statute . . . " or to ignore and read out of the Hyde Amendment its express adoption of the procedures and limitations of Section 2412. This Court cannot ignore either proviso.
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> Second, the Hyde Amendment was passed in order to "incorporate the EAJA into the criminal context to the extent applicable." *United States v. Gardner*, 23 F.Supp.2d 1283, 1290 (N.D. Okla. 1998). The argument that the Hyde Amendment provides a separate source of statutory authority for allowing the award of fees in criminal cases solely under § 2412(b) undercuts this rationale. As the Government points out, if this interpretation of the Hyde Amendment were accepted, every litigant would choose to proceed only under § 2412(b) and thereby avoid all limitations of Section 2412.

Third, waivers of sovereign immunity, like that found in the Hyde Amendment, are to be narrowly construed. *See Russell v. National Mediation Bd.*, 775 F.2d 1284, 1287 (5th Cir. 1985) (citing cases). Congress was aware of the limitations of § 2412(d) when it passed the Hyde Amendment. If it intended those exceptions not to apply, then appropriate language could have been inserted in the legislation. Congress did carve out a modification, for example, when it expressly stated in the Hyde Amendment that the EAJA burden of proof was not applicable.

Fourth, the applicability of § 2412(d) is further indicated when one compares the language used in the Hyde Amendment with the language of §2412(d)(1)(A). The Hyde Amendment authorizes an award when "the court finds that the position of the United States was vexatious, frivolous, or in bad faith, *unless the court finds that special circumstances make such an award unjust,*" (emphasis added). The model for the phraseology of this language appears to have been §2412(d)(1)(A), which authorizes a fee award "unless the court finds that the position of the United States was substantially justified *or that special circumstances make an award unjust.*" (emphasis added). No similar language is found in § 2412(b). It seems untenable, therefore, to argue that when Congress incorporated the "procedures and limitations" of Section 2412, that it was oblivious to, or intended implicitly to exclude, the specific procedures and limitations contained in § 2412(d).

Finally, although there were no hearings or committee reports generated regarding the Hyde Amendment, Representative Hyde's remarks when he introduced the Amendment generally imply that applications filed under the Hyde Amendment should be scrutinized in the

> same manner as a case brought under § 2412(d) of the EAJA. *See* 143 Cong. Rec. H7786-04, H7791 (daily ed. Sept. 24, 1997).

Id. at 699-700.

These reasons for applying § 2412(d) of EAJA to applications for recovery of fees and costs under the Hyde Amendment are persuasive. In light of these reasons, and, as well, in light of the legislative history as discussed in depth in *Gilbert* and summarized above, I conclude that defendant Skeddle's application under the Hyde Amendment is governed by § 2412(d).

B. Defendant's Application is Not Procedurally Barred

The government contends that the application must be denied because it did not include a showing that Skeddle's net worth at the time the case was filed was less than $2,000,000. This contention raises three issues, namely whether: 1) the date as of which the defendant's net worth is to be computed is the date of the filing of the original indictment or the date of the superseding indictment; 2) failure to include the required net worth statement when the motion initially was filed barred consideration of the motion; and 3) the defendant's net worth statement is sufficient.

Section 2412(d)(2)(B) of EAJA provides that, to be entitled to recover under the statute, the party must not have a net worth in excess of $2,000,000 "at the time the civil action was filed." Defendant contends that in the context of a criminal prosecution, the action must be deemed "filed" as of the date of the charging instrument on which he proceeds to trial. In this case, that would mean a date of April, 1998, when the superseding indictment was returned. Otherwise, the defendant argues, the government could wear a defendant down with successive prosecutions while depriving him of his right to seek Hyde Amendment reimbursement.

The case does not present that problem. Here, severance was granted on the motion of some of defendant's co-defendants. He did not object to the motion to sever and cannot now complain about that decision. Indeed, he later benefitted from it when I dismissed the tax conspiracy count on the basis of double jeopardy even though no evidence had been presented on that the tax aspect of the conspiracy count at the first trial. In any event, for this purpose, as for other purposes, a superseding indictment should be deemed to relate back to the date of filing of the original indictment. *See United States v. Smith*, 197 F.3d 225, 228 (6th Cir. 1999) (superseding indictment relates back to date of filing of original indictment for purposes of statute of limitations).

Defendant's failure to submit a detailed net worth statement when he filed his Hyde Amendment motion should not foreclose his ability to be heard on the motion's merits. Other courts have permitted post-filing supplementation of EAJA motions, *Bazalo v. West*, 150 F.3d 1380 (Fed. Cir. 1998); *Dunn v. United States*, 775 F.2d 99 (3d Cir. 1985), and I see no reason not to follow their lead in this criminal case. At worst, failure to have included the affidavit probably resulted from inadvertence on the part of counsel, who, while asserting in the motion that the defendant met the requirements of § 2412(d), focused his efforts on the assertion that the defendant could bring the motion under § 2412(b). The government, moreover, alleges no prejudice, and I can perceive none that could arise.

Finally, I conclude that defendant Skeddle's affidavit, because it is undisputed by the government, suffices to show that his net worth was less than $2,000,000 when the indictment was filed. There is, accordingly, no merit to the government's procedural objections to defendant's Hyde Amendment motion.

C. Prosecution of the Defendant was Not Vexatious, Frivolous or in Bad Faith

1. General Standard

To prevail on the motion for fees, expenses, and costs, the defendant must show that the prosecution was vexatious, frivolous, or in bad faith. If any one of these is shown, he is entitled to recover. To determine the meaning of these terms, courts have looked to Black's Law Dictionary and other standard sources. *See, e.g., Gilbert,* — F.3d at ---; *Holland,* 34 F. Supp. 2d at 360 n.23.

As stated in *Gilbert*:

> "Vexatious" means "without reasonable or probable cause or excuse." Black's Law Dictionary 1559 (7th ed. 1999); *see also Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 421, 98 S.Ct. 694, 700, 54 L.Ed.2d 648 (1978) (describing "vexatious" conduct in the Title VII context as being "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith"). A "frivolous action" is one that is "[g]roundless . . . with little prospect of success; often brought to embarrass or annoy the defendant." Black's Law Dictionary 668 (6th ed. 1990); *see also* Fed. R. Civ. P. 11. Finally, "bad faith" "is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; . . . it contemplates a state of mind affirmatively operating with furtive design or ill will." Black's Law Dictionary 139 (6th ed. 1990); *see also Franks v. Delaware,* 438 U.S. 154, 171, 98 S.Ct. 2674, 2684, 57 L.Ed.2d 667 (1978) (defining bad faith in the law enforcement context to include "reckless disregard for the truth").

The court in *Gilbert* also pointed out that

> more is required under the Hyde Amendment than a showing that the defendant prevailed at the pre-trial, trial, or appellate stages of the prosecution. A defendant must show that the government's position underlying the prosecution amounts to prosecutorial misconduct — a prosecution brought vexatiously, in bad faith, or so utterly without foundation in law or fact as to be frivolous.

Id. at ----.

In the Sixth Circuit the term "frivolous" has been held to mean "'when the result is obvious or when the appellant's argument is wholly without merit,'" *Allinder v. Inter-City Products Corp. (USA)*, 152 F.3d 544, 552 (6th Cir. 1998) (*citing Depoister v. Mary M. Holloway Found.*, 36 F.3d 582, 588 (7th Cir. 1994)), or "it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief." *Malone v. Colyer*, 710 F.2d 258, 261 (6th Cir. 1983).

An award of fees is appropriate "where no evidence supports the . . . position or the defects in the suit are of such magnitude that . . . ultimate failure is clearly apparent from the beginning or at some significant point in the proceedings after which the [losing party] continues to litigate." *Smith v. Smythe-Cramer Co.*, 754 F.2d 180, 183 (6th Cir. 1985). Fees have been awarded on the basis that a proceeding was groundless where the party proceeded forward despite repeated notice that it was not lawfully able to do so. *E.E.O.C. v. Bellemar Parts Industries, Inc.*, 868 F.2d 199, 200 (6th Cir. 1989). Proceeding to trial on inadequate evidence may result in a sanction. *In re Ruben*, 825 F.2d at 990 n.11.

The Sixth Circuit has, however, also made clear that "that simple inadvertence or negligence . . . will not support a sanction." *In re Ruben*, 825 F.2d at 984. Thus, "while an attorney may be sanctioned for not acquiring facts necessary

to rebut his good faith belief that the case warranted prosecution, inadequate pretrial preparation by itself . . . cannot justify a conclusion that [counsel] pursued the case in bad faith. *Id.* "The mere finding that an attorney failed to undertake a reasonable inquiry into the basis for a claim does not automatically imply that the proceedings were intentionally or unreasonably multiplied." *Ridder v. City of Springfield*, 109 F.3d 288, 298 (6th Cir. 1997).

Denial of a dispositive motion does "not preclude the district judge from imposing sanctions if the case was factually frivolous." *In re Ruben*, 825 F.2d 977, 988 (6th Cir. 1987). On the other hand, the Sixth Circuit has stated that it would be "at a loss to understand how a case that is strong enough to withstand a motion for judgment at the conclusion of the plaintiff's proofs can be considered 'frivolous, unreasonable, or without foundation.'" *Haynie v. Ross Gear Div. of TRW, Inc.*, 799 F.2d 237, 242 (6th Cir. 1986). As long as "one of the plaintiff's claims is non-frivolous, the defendant's attorney fees may not be shifted to the plaintiff even though others of the plaintiff's claims are patently without merit. *Id.* (*citing Tarter v. Raybuck*, 742 F.2d 977, 987-88 (6th Cir. 1984)).

In sum, in the Sixth Circuit an award of fees must be based on "some conduct on the part of the subject attorney that trial judges, applying the collective wisdom of their experience on the bench, could agree falls short of the obligations owed by a member of the bar to the court and which, as a result, causes additional expense to the opposing party." *In re Ruben*, 825 F.2d at 984.

2. The Standard Applied to This Case

To understand the issues raised by defendant's Hyde Amendment motion, it is necessary to have some background understanding of the prosecution and events leading to separate trials and acquittal of defendant Skeddle on all counts alleged against him.

As noted, Skeddle was the President and CEO of Libbey-Owens-Ford Company. The company decided that it would out-source its computer operations. Without disclosing their interest to the company, Skeddle and two of his codefendants, who were Vice-Presidents of LOF, created a set of corporations for the purpose of acquiring the out-sourcing contract and concealing their receipt of the proceeds from that contract. With part of the initial profits from the out-sourcing contract, Skeddle and the Vice-President defendants purchased gas wells from LOF, again without disclosing their involvement in the transaction. Their self-dealing ultimately was uncovered as they were seeking to enter into a contract with LOF to provide robots to be used in the company's manufacturing operations. By then the original out-sourcing contract had generated about $9,000,000 for the three executives.

Before entering into any of these activities, Skeddle and his colleagues consulted with counsel of the firm of Wickens, Herzer & Panza of Lorain, Ohio. They expressly told the lawyers they wanted to avoid violating the law and, as well, conceal their self-dealing from LOF. The lawyers advised them that their proposed self-enrichment scheme was lawful as long as the transaction was fair to the company.

To accomplish the dual purposes of engaging in self-dealing with the company and keeping their activities hidden from its view, the lawyers created a three-level corporate structure, with 1) a Subchapter C corporation contracting

with LOF and providing the computer services to LOF; 2) an intermediate set of S corporations through which the earnings from the out-sourcing contract passed to the last level; and 3) the last level, which was a set of Subchapter S corporations (one each for Skeddle and the Vice-Presidents) into which the earnings from the out-sourcing contract finally flowed. The S corporation receiving Skeddle's share of the proceeds from the out-sourcing contract was the SWR Corporation (SWR being Skeddle's initials in reverse).

To avoid double taxation on the distribution of the C corporation's out-sourcing profits, the lawyers created documentation purporting to show that the distribution by the pass through corporations was in exchange for tax-deductible operational expenses and management fees paid to the SWR and other end-tier S Corporations. The lawyers also prepared consulting agreements purporting to show that the end-tier S corporations, including SWR, were providing consulting services in exchange for the proceeds of the out-sourcing contract.

Skeddle had a unique problem, that the other two participants did not have: namely, that his personal tax returns were prepared by the accountancy firm that also did LOF's tax work. Were he to be the denominated owner of the SWR Corporation, he anticipated he would have to tell LOF's accountants about the source of its income. Such disclosure, Skeddle feared, would make the company aware of his self-dealing.

To avoid this problem, the lawyers had Skeddle place ownership of the SWR Corporation in the names of his five children. Accountants working with the lawyers whom Skeddle had consulted prepared corporate tax returns for SWR. Statements contained on those returns led to the tax fraud charges against Skeddle.

As originally returned, the indictment named nine defendants and contained over 300 counts (more than 200 of which alleged money laundering). All nine defendants were charged with conspiracy to commit and having committed mail and wire fraud, money laundering, and tax fraud. Only Skeddle, the two Vice-Presidents, and the accountants were named in the substantive tax fraud charges.

On motion of some of the defendants, the substantive tax fraud charges were severed. Following a three month trial, the money laundering charges were dismissed at the close of the government's case. The defense rested without presenting evidence, and the jury returned not guilty verdicts as to all defendants and all counts.

After being granted leave to determine whether it wanted to proceed on the severed tax counts, the government, now represented by new counsel, procured a superseding indictment against Skeddle, one of the Vice-Presidents, and one of the accountants. The superseding indictment charged the three defendants with conspiracy to commit tax fraud, and each defendant was charged with individual substantive tax counts. These included two substantive tax fraud counts against Skeddle.

On pretrial motion by the defendants, the tax conspiracy count was dismissed on the basis of double jeopardy. When the substantive tax counts were severed prior to the first trial, no mention was made by the parties, or cognizance taken by me, of the tax-related allegations in the conspiracy count in the original indictment. Even though no evidence had been offered as to the tax aspect of the general conspiracy charge during the mail and wire fraud and money laundering trial, I concluded that jeopardy had attached, so that prosecution of the tax fraud conspiracy count in the superseding indictment was barred.

The substantive tax fraud charges against Skeddle alleged that the following statements, as reported in the SWR returns, were false: 1) the children were the owners of SWR; 2) SWR was in the business of "Consulting" with a product or service of "Computer Services; and 3) SWR was entitled to claim salary deductions for monies paid to the children. It was the government's theory of prosecution that SWR was not a legitimate business, but was, rather, simply a means of secretly funneling the profits from the out-sourcing contract to Skeddle. The government also believed that the evidence showed knowledge on Skeddle's part that that was the true purpose of SWR, so that he knew statements to the contrary in the tax returns were false.

As a matter of state law, the Skeddle children were the owners of SWR. The government's theory as to the first of its three allegations (that the SWR returns falsely reported that SWR was owned by the children) was based not on the corporate documents, but the theory of de facto ownership — control — by defendant Skeddle. He set up the corporation, he controlled the corporation and disbursement of its funds, and, to the extent that anything was done on its behalf, he did it. His children acknowledged being unaware of their ownership of SWR and the receipt by them, as claimed on the tax returns, of salaries. They testified that they did no work for SWR.

During voir dire counsel for Skeddle informed the prosecution that the government's ownership theory was invalid as a matter of law. Government counsel, according to Skeddle's lawyer, made no response. At the completion of the government's case, however, government counsel acknowledged that the jury could not find that the children were not the owners. On the basis of that concession, that aspect of its case was dismissed.

Defendant Skeddle moved under Fed. R. Crim. P. 29 for dismissal of the other charges, arguing that the proof as to the second and third aspects of the government's allegations was likewise insufficient. That motion was overruled on the basis that there was sufficient evidence for the case to go to the jury.

In overruling Skeddle's Rule 29 motion, I concluded that the government's proof sufficed to show that, notwithstanding the operational/management services and consulting agreements executed on behalf of the pass through corporation, no consulting was done, and no computer services were performed by SWR. Had no further evidence been presented, the jury could have convicted the defendant.

With regard to government's theory concerning the alleged falsity of the deductions claimed for salaries, I concluded that the jury, if it found that SWR performed no business and provided no service, could also find that the deductions for salaries paid to the children were false. In any event, I also concluded that, even if SWR was in the consulting business and provided computer services, the jury nonetheless could find that the children were not paid salaries because they did no work for SWR. The case thereafter continued with regard to two of the government's three theories of prosecution.

Although the defendant Skeddle did not testify, the defense offered proof that he and his codefendant worked on behalf of their respective S corporations in an effort to obtain new business for the subchapter C corporation that had contracted with LOF. These efforts by Skeddle involved principally contacts with other persons in the business community to encourage them to contract with the C corporation to "grow" its business.

The defendant contended that SWR was in the business of providing computer services because the intermediate corporations were merely pass through corporations, through which

funds from the C corporation flowed in one direction, while services flowed from SWR to the C corporation in the other direction.

On the issue of Skeddle's knowledge that the deduction for the salaries was false, the defendant's proof showed that Skeddle had been advised that services had to be performed in exchange for salary only with regard to a C corporation. Thus, there was no proof that Skeddle had been told that his children could not be credited with receiving salary payments only if they had, in fact, done work for SWR. Thus, although the Skeddle children had done no work to earn any salaries from SWR, there was no evidence in the record of knowledge on Skeddle's part that his children had to perform work before salaries could be paid to them and deducted from SWR.

The defendant's evidence also showed that the money allocated as salaries had either been used to pay taxes due on the SWR receipts or, in quite modest amounts, had been paid to the Skeddle children. Thus, the defendant's proof showed that the funds had, in fact, been received by the children, as reflected in the returns.

In light of the defendant's proof, and the record as a whole, I found his arguments in support of his renewed Rule 29 motion persuasive, and dismissed the charges against him. His motion for reimbursement under the Hyde Amendment followed.

Defendant argues in his motion that the government's prosecution was frivolous, vexatious, and in bad faith because: 1) the government's contention that the children were not the owners of SWR was unfounded from the outset; 2) it knew all along that its claim that SWR was not in the consulting business and provided no services was bogus; and 3) it was well aware that children received salaries and the related deductions were lawful.

I disagree with the defendant that the government's prosecution was frivolous, vexatious, or in bad faith. Its view was not unfounded or frivolous that SWR was intended to be and functioned as a depository into which funds flowed from the C corporation to Skeddle, who controlled SWR and disbursement of its receipts, so that the children were nominee owners and only putative recipients of the profits of the out-sourcing contract. The flaw in the government's theory was that it could not get behind the children's de jure ownership and prove its case on the basis of Skeddle's de facto domination of SWR and all its affairs.

More careful analysis of the law and evidence might have shown the government earlier on that it could not prevail. But I do not find that the failure to undertake that analysis, even after defense counsel told it during voir dire that its theory was invalid as a matter of law, rendered its proceeding on this theory frivolous. Nor do I believe or find that the government's decision to proceed on this theory was vexatious or manifested bad faith.

Likewise the government's perception that Skeddle's efforts to obtain new business for the C corporation were undertaken on its behalf, rather than on behalf of SWR, also was not unfounded or frivolous. The government properly could have that perception, given Skeddle's rather modest efforts to "grow" the out-sourcing business. Those efforts consisted principally, if not entirely, of his use of contacts within the business community to get other companies to out-source their computer operations with the C corporation.

There was not indication, moreover, that, at the time Skeddle was engaged in those activities, he told prospective customers that he was doing so on behalf of his S company, or that they were aware of its existence. The record contains no indication that the S corporation maintained an office, had its own phone, had or used letterhead or business cards, or manifested any of the other indicia of an active, bona fide

enterprise. The government, accordingly, even in the face of the operations/management and consulting contracts with the pass through corporations, had a good faith belief that SWR was not in the consulting business and had not provided computer services.

Although, at the end of the case, I concluded that the evidence was insufficient to enable the jury to reach that conclusion beyond a reasonable doubt, I cannot find, and do not find that the government acted in frivolously, vexatiously, or in bad faith in prosecuting the defendant on the basis of the statements about SWR's activities in its tax returns. The same is true with regard to its perception that no salaries could be paid, and no deductions taken, where no business was being conducted by or on behalf of the corporation.

This is not to say there was nothing troublesome about the government's presentation. Counsel who prosecuted Skeddle on the tax charges were, and admitted to being (if memory serves), unfamiliar with the record of the trial on the mail and wire fraud and money laundering charges. At times, government counsel took inconsistent positions among themselves on matters of evidence or law. But these failings and other shortcomings do not rise to the level of bad faith, vexatiousness, or frivolousness. *See Peterson*, 71 F.Supp. 2d at 698 ("Hyde Amendment does not apply when the position of the United States is the product of simple negligence or benign prosecutorial misjudgment, and may not apply even when the government has so little proof of guilt that no rational trier of fact could find the defendant guilty beyond a reasonable doubt.").

The defendant contends that I was misled by the government's presentation, in light of its alleged knowledge about the de jure ownership of SWR by the children, Skeddle's efforts to recruit new business, and the actual receipt by the children of monies from SWR. Based on my participation in

the mail and wire fraud and money laundering trial and this case, I do not find that I was misled by the government's prosecution or the positions it took during the tax fraud trial.

Cases in which Hyde Amendment awards have been made are distinguishable from this case. In this case no ancillary benefit would have come to the government from a successful prosecution. This is not a case, accordingly, where, as in *Holland*, *supra*, the government can be seen as having pursued its prosecution in order to further some other governmental goal. In *Holland*, in the court found that a government agency improperly threatened prosecution to influence settlement and referred the case on impermissible conditions, and the government improperly used the referral as a substitute for unsuccessful administrative proceedings. 34 F.Supp.2d at 361.

Nor does the defendant allege that the government failed to fulfill its obligations under *Brady* or otherwise mislead the defense, as occurred in *United States v. Ranger Communications*, 22 F.Supp.2d 346, 361 (E.D. Va. 1999). In that case the court granted a Hyde Amendment award when the prosecutor violated *Brady* by failing to share exculpatory information.

The government's handling of the prosecution in this case was not sanctionable. The defendant's motion for reimbursement under the Hyde Amendment must, accordingly, be denied.

Conclusion

In light of the foregoing, it is hereby

ORDERED THAT that the motion of the defendant Skeddle for an award of fees, costs, and expenses under the Hyde Amendment be, and the same hereby is denied.

So ordered.

/s/ James G. Carr
James G. Carr
United States District Judge

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 00-3195

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FILED
AUG 29 2002
LEONARD GREEN, Clerk

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

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This notice is to be prominently displayed if this decision is reproduced.

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. RONALD W. SKEDDLE, *Defendant-Appellant.*	)	On Appeal from the United States District Court for the Northern District of Ohio

Before: BOGGS and MOORE, Circuit Judges; and RUSSELL, District Judge*

* The Honorable Thomas B. Russell, United States District Judge for the Western District of Kentucky, sitting by designation.

PER CURIAM. Ronald W. Skeddle appeals the district court's order denying him attorneys' fees under the Hyde Amendment, 18 U.S.C. § 3006A, statutory note. Skeddle claims that he is entitled to attorneys' fees incurred in defending against a prosecution for various counts of tax fraud and filing false tax returns. According to Skeddle, the United States's legal positions in that prosecution were "vexatious, frivolous, or in bad faith," given the readily ascertainable facts. For all of the following reasons, we affirm the district court's denial of his motion under the Hyde Amendment.

I

Skeddle's claim for attorneys' fees is the product of a lengthy and complicated federal criminal prosecution. In 1995, the government obtained a 313-count indictment against Skeddle, Darryl J. Costin, *see United States v. Costin*, Nos. 00-3195, 00-3287, 00-3288, and six other co-defendants. After pre-trial motions, Costin, Skeddle, and their co-defendants were tried on over 200 counts, which included mail and wire fraud, conspiracy, and money laundering. These charges were all directed at a transaction between Libbey-Owens-Ford Company ("LOF"), of which Skeddle and Costin were executives, and Computer Technology Management ("CTM"), a computer services company that Skeddle and Costin established. LOF contracted with CTM for computer consulting work.

CTM was itself a complicated entity. It was wholly owned by three corporations, operated by Professor Clarence Martin, a computer scientist and friend of Costin and Skeddle. These three corporations were known as the Martin Companies. Each of three companies, CJD (owned and operated by Costin), SWR (operated by Skeddle), and BBE (owned and

operated by Edward Bryant, another LOF executive), wholly owned one of the three Martin Companies respectively. SWR was formally owned by Skeddle's young children.

The indictment alleged that this elaborate configuration of corporations was designed to conceal self-dealing of LOF business to the three LOF executives and to embezzle money from LOF through payments to CTM for phantom computer-consulting services. After an extensive jury trial, the jury acquitted all of the defendants of all counts.

Coming up empty on the first prosecution, government prosecutors referred Costin, Skeddle, and Robert Hobe, their accountant, to the Tax Division of the Department of Justice. The government then obtained an eighteen-count indictment against Costin, Skeddle, and Hobe, including various charges of tax fraud. At various points in the proceedings, the district court entered judgments of acquittal for the defendants on sixteen of the eighteen counts. By the end of the trial, the district court had entered judgments of acquittal on all of the counts against Skeddle. Only four counts — two against Hobe and two against Costin — remained when the case was finally submitted to the jury.

After the court had dismissed all charged against Skeddle by judgment of acquittal, Skeddle filed a motion for attorneys' fees under the Hyde Amendment. Skeddle claimed that each of the charges brought by the government had obvious flaws that could have been revealed through the slightest investigation by the government. Skeddle's attorney claimed that the fees, costs, and expenses incurred in defending against the tax fraud prosecution amount to $654,000. Although none of the counts on which Skeddle was indicted reached the jury, the district court denied Skeddle's motion for attorneys' fees. According to the court, the government's prosecution of Skeddle was neither vexatious, frivolous, nor taken in bad

faith. While noting that the government's legal position in the prosecution was "legally incorrect," the district court held that it was not "unreasonable."

Skeddle now appeals the district court's denial of attorneys' fees.

II

Enacted in 1997, the Hyde Amendment permits courts to award criminal defendants damages when the government takes a position in a prosecution that "was vexatious, frivolous, or in bad faith, unless the court finds that special circumstances would make such an award unjust." 18 U.S.C. § 3006A, statutory note. Given the recency of the Amendment's passage, we have not had occasion extensively to discuss the standard governing the decision to award fees — although the Amendment does provide us some additional guidance. Awards shall be made, according to the Amendment, pursuant to the "procedures and limitations (but not the burden of proof) provided for an award" under the Equal Access to Justice Act. *See* 28 U.S.C. § 2412.

The mere fact that the government prosecution was unsuccessful does not establish that the prosecution was "vexatious, frivolous, or in bad faith." *United States v. Gilbert*, 198 F.3d 1293, 1302-03 (11th Cir. 1999). Indeed, a criminal defendant seeking recovery under the Hyde Amendment faces "a daunting burden." *Ibid.* To demonstrate that a prosecution was taken in bad faith, the defendant must show more than simple negligence, but some evidence of conscious wrongdoing on the part of the government. *See United States v. True,* 250 F.3d 410, 422-23 (6th Cir. 2001). For a position of the government to be vexatious, it must be "without reasonable cause or excuse." *Ibid.*

The substantive standard, requiring that the United States's position be "vexatious, frivolous, or in bad faith" before attorneys' fees are awarded, is not further defined in the statute.

The elements of the standard are disjunctive: the position of the United States need only be either "vexatious" or "frivolous," or "in bad faith" to permit recovery. Several courts have struggled with clarifying the standard that the Hyde Amendment establishes. For example, one circuit court of appeals has explained at length that the "vexatious" prong of the Amendment requires that the government's position be *both* without factual or legal foundation *and* provide objective evidence of maliciousness on the part of government prosecutors. *See Knott*, 256 F.3d at 30-31. We note that even if the vexatious prong of the Amendment requires maliciousness, a prevailing party may still recover because the government position was "frivolous," which appears only to require that the government's position completely lack evidential or legal merit. *See ibid.* (recognizing that the "frivolous" element does not require a finding of maliciousness). The Hyde Amendment is not aimed at the general run of prosecutions, or even those that the government loses, but instead at instances of "prosecutorial misconduct," where the government had undertaken obviously groundless positions in a prosecution or positions intended solely to harass defendants rather than to vindicate the rule of law. *Gilbert*, 198 F.3d at 1303; *Knott*, 256 F.3d at 28. In contrast, the Hyde Amendment does not shift to the government the risk of not prevailing always associated with litigating matters of law and fact on which reasonable people can disagree before courts and juries.

Insofar as the Hyde Amendment requires that the government's position be "vexatious, frivolous, or in bad faith" before the recovery of fees is permitted, it establishes a substantially more rigorous standard than the Equal Access to Justice Act, which merely requires that the government's position be "not substantially justified." 28 U.S.C. § 2412 (d)(1)(A); *United States v. Knott*, 256 F.3d 20, 28 (1st Cir. 2001) (explaining that Congress expressly rejected the EAJA's substantive standard for recovery because it was too

easy to meet). Also unlike the EAJA, the Hyde Amendment places the burden to prove the standard for a fee award on the criminal defendant. *Knott*, 256 F.3d at 29. *Compare* Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A) (requiring that courts award attorneys' fees to a private party prevailing against the United States "*unless* the court finds that the position of the United States was substantially justified or that special circumstances make the award unjust").

Most importantly, we will only overturn a district court's denial of a request for fees under the Hyde Amendment for an abuse of discretion. *True*, 250 F.3d at 421. The district court, having conducted the entire trial and witnessed the government's case, is in a far superior position to evaluate whether the government's position was vexatious, frivolous, or in bad faith. The court has a fresh recollection of the government's conduct that this court's review of the cold record simply cannot provide. Nevertheless, the deferential abuse of discretion standard of review is not completely toothless: we will overturn a district court determination as an abuse of discretion when we are "firmly convinced that a mistake has been made," or put differently, "when were are left with a definite and firm conviction that the trial court committed a clear error in judgment." *Id.* at 422 n.9.

We are not convinced that the district court abused its discretion in this case. Skeddle argues that the government's prosecution of him was "vexatious, frivolous, or in bad faith" in three respects. First, Skeddle contends that the government's position that he had filed a false tax return of SWR, by claiming that his children were the sole owners of the corporation, had no basis in law or fact. The district court found that it was literally true that Skeddle's children were the only owners of SWR and that the government "could have discovered earlier that it could not prevail on this claim." If we were to characterize the government's position as simply that Skeddle misrepresented the legal owners of SWR, we might

hold its true owners were so easy to discover that the government must have been consciously avoiding knowledge at best. But the government's theory was far more complicated, that Skeddle made his children record owners in order to conceal income that was actually his. While this theory of filing a false income tax return may not have survived a motion for acquittal, it certainly was not so clearly defective so as to lead us to suspect that the government was up to something nefarious.

Second, Skeddle contends that the government's "shell theory" was taken in bad faith. Similar to the allegations in Costin's prosecution, the government contended that SWR never engaged in any computer consulting and, therefore, was not a business and was not entitled to any business deductions. According to Skeddle, the government should have known that it could not prevail on this argument, given some evidence in the record that Skeddle used his contacts in the business community to create business for CTM. The district court found that because Skeddle's activities for CTM were so "modest," the government's theory was not frivolous, even if ultimately unsuccessful. We agree with the district court that Skeddle's consulting activities were sufficiently subtle that, given the significant income that SWR had from alleged consulting and the complexity created by the Martin pass-through corporations, the government's position was not so patently without merit that we must agree that the government had to be aware of its defects.

Third and finally, Skeddle argues that the government's contention that he never paid his children salaries claimed as expenses by SWR was frivolous and taken in bad faith. According to Skeddle, it should have been clear to the government, from the fact Skeddle withheld taxes for the children, that the salaries were paid. To us, however, the government's position does not seem all that absurd. While Skeddle withheld the taxes, the government's theory was that

he retained the salaries for his own use — a reasonable, if ultimately unsuccessful, claim given that he controlled all his children's assets.

Throughout his argument, Skeddle claims that the government's case bears many similarities to *United States v. Holland*, 34 F.Supp.2d 346 (E.D. Va. 1999), in which the district court awarded the criminal defendant attorneys' fees under the Hyde Amendment. But Skeddle must see the difference between the district court's position in *Holland* and this court reviewing a district court's denial of a Hyde Amendment fees. While granting fees in *Holland* may have been within the district court's discretion, the denial of fees quite likely would also have been within its discretion. Because we review the district court's denial of fees for an abuse of discretion, even a finding that this case and *Holland* were "on all fours" would not determine our result.

III

Because the district court did not abuse its discretion, we AFFIRM the district court's order denying Skeddle fees under the Hyde Amendment.

Supreme Court, U.S.
FILED
FEB 10 2003
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No. 02-868

In the Supreme Court of the United States

RONALD W. SKEDDLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion when it denied petitioner's motion for attorneys' fees, costs, and expenses under the Hyde Amendment, Pub. L. No. 105-119, Tit. VI, § 617, 111 Stat. 2519.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A29-A36) is not published in the Federal Reporter, but is reprinted at 45 Fed. Appx. 443. The opinion of the district court (Pet. App. A1-A28) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 29, 2002. The petition for a writ of certiorari was filed on November 27, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After the presentation of the defense's case during a jury trial, the United States District Court for the Northern District of Ohio granted petitioner's motion

for a judgment of acquittal on two counts of willfully making and subscribing false tax returns, in violation of 26 U.S.C. 7206(1). See Pet. App. A21-A24; Gov't C.A. Br. 3. After his acquittal, petitioner filed a motion under the Hyde Amendment, Pub. L. No. 105-119, Tit. VI, § 617, 111 Stat. 2519, for an award of attorneys' fees, costs, and expenses. The district court denied the motion. Pet. App. A1. The court of appeals affirmed. *Id.* at A29-A36.

1. Petitioner is a former president and chief executive officer of Libbey-Owens-Ford Company (LOF). Petitioner and a vice-president of LOF established a company called Computer Technology Management, Inc. (CTM), which obtained a contract to perform computer work for LOF. The contract provided the LOF executives a profit of "approximately $9,000,000 from undisclosed self-dealing with LOF." Pet. App. A1 n.1; see *id.* at A19, A30-A31.

The LOF executives used a three-tiered structure of corporations to conceal their role in CTM. Earnings from CTM's computer contract flowed to three second-level corporations operated by a friend of the LOF vice-president, and then to three other corporations including SWR Corporation (SWR), which received petitioner's share of the proceeds. To further conceal his own participation in the computer contract, petitioner named his five children as the owners of SWR. Pet. App. A19-A20, A30-A31.

SWR's corporate tax returns for 1991 and 1992 reported that SWR's business was "consulting" and that SWR rendered "computer services." The returns claimed salary deductions for money paid to petitioner's children, although none of the children (who then ranged from 9 to 21 years-old) was employed by SWR. Consulting agreements purported to reflect services

that SWR would provide the second-level companies, but neither petitioner nor his children provided computer consulting services to any of the second-level companies during 1991 or 1992. Pet. App. A20, A22; Gov't C.A. Br. 8-9.

2. In 1995, petitioner and six co-defendants were indicted on mail fraud, wire fraud, conspiracy, and money laundering charges, of which they were acquitted. In 1998, a federal grand jury returned a superseding indictment charging petitioner and two co-defendants with tax fraud and tax conspiracy. Two counts of the superseding indictment charged petitioner with making and subscribing false corporate tax returns, in violation of Section 7206(1). Pet. App. A31; Gov't C.A. Br. 3. The tax conspiracy count was dismissed before trial. Pet. App. A21.

During petitioner's trial, the government attempted to show that SWR's 1991 and 1992 returns were false insofar as they reported that: (1) petitioner's children were the owners of SWR; (2) SWR received gross receipts from the business activity of consulting and the product or service of computer services; and (3) SWR was entitled to claim deductions for salaries and other specified business expenses. Pet. App. A22; Gov't C.A. Br. 14-15. The government advised the court after presenting its case that it could not prove that petitioner falsely claimed that his children were the owners of SWR. Pet. App. A22. Petitioner then challenged the government's other two theories in a motion for a judgment of acquittal under Federal Rule of Criminal Procedure 29. The district court denied the Rule 29 motion because, based on the evidence presented by the government, "the jury could have convicted." *Id.* at A22-A23. Petitioner renewed his Rule 29 motion after

the defense presented its case, and the district court granted the motion at that time.

3. After his trial, petitioner filed a motion under the Hyde Amendment to recover attorneys' fees, costs, and expenses from the government. The Hyde Amendment provides in relevant part:

> [T]he court, in any criminal case (other than a case in which the defendant is represented by assigned counsel paid for by the public) * * * may award to a prevailing party, other than the United States, a reasonable attorney's fee and other litigation expenses, *where the court finds that the position of the United States was vexatious, frivolous, or in bad faith*, unless the court finds that special circumstances make such an award unjust.

18 U.S.C. 3006A note (emphasis added). The district court denied petitioner's motion, concluding that the government's prosecution was not—as the Hyde Amendment requires—"frivolous, vexatious, or in bad faith." Pet. App. A25-A28.

4. The court of appeals affirmed in an unpublished opinion. Pet. App. A29-A36. The court of appeals stated that under the "frivolous" prong of the Hyde Amendment's test, a prevailing defendant who does not show that the prosecution was malicious nevertheless may obtain an award if "the government's position completely lack[ed] evidential or legal merit." *Id.* at A33. The court added, however, that "[t]he Hyde Amendment is not aimed at the general run of prosecutions, or even those that the government loses, but instead at instances of 'prosecutorial misconduct.'" *Ibid.*

Applying the Hyde Amendment standards, the court of appeals considered each of the three theories underlying the government's tax-fraud prosecution. As to

the theory that petitioner's children were not the true owners of SWR, the court concluded that the government's argument—that the children's titular ownership should not be dispositive in light of petitioner's entire scheme—"certainly was not so clearly defective so as to lead us to suspect that the government was up to something nefarious." Pet. App. A35. The court likewise concluded that the government's second theory —that SWR did not receive any gross receipts for consulting or selling computer services—"was not so patently without merit that we must agree that the government had to be aware of its defects." *Ibid.* Finally, the court determined that the government's contention that SWR was not entitled to claim deductions for expenses, including salaries paid to petitioner's children, was based on a "reasonable, if ultimately unsuccessful" theory. *Id.* at A36. The court therefore determined that the district court did not abuse its discretion when it denied petitioner's motion for an award. *Id.* at A34.

ARGUMENT

Petitioner asserts (Pet. 9-16) that the court of appeals erred in affirming the district court's denial of his motion for an award under the Hyde Amendment. Petitioner's contention lacks merit and does not warrant this Court's review.

1. Petitioner argues primarily that the unpublished decision of the court of appeals incorrectly "add[s] a subjective component to the 'frivolous' prong of the Hyde Amendment" (Pet. 13) and therefore conflicts with decisions of other courts that "have held that a legal position is 'frivolous'" within the meaning of the Hyde Amendment "if it is *objectively* without any arguable merit" (Pet. 11). See Pet. 11-13 (discussing

United States v. *Braunstein*, 281 F.3d 982, 995 (9th Cir. 2002); *United States* v. *Knott*, 256 F.3d 20, 29-30 (1st Cir. 2001), cert. denied, 534 U.S. 1127 (2002); *United States* v. *Gilbert*, 198 F.3d 1293, 1304 (11th Cir. 1999)). According to petitioner, the Sixth Circuit has in this case "engrafted" onto the Hyde Amendment's frivolousness standard, in addition to that objective test, a "*subjective* component, that the Government must also be 'up to something nefarious.'" Pet. 11.

Petitioner's argument is unfounded. The court of appeals plainly stated that the Hyde Amendment authorizes an award against the United States if the government's position in the unsuccessful prosecution was frivolous, and that this test "appears only to require that the government's position completely lack[ed] evidential or legal merit." Pet. App. A33. The court of appeals approvingly cited *Knott*, *supra*, as "recognizing that the 'frivolous' element does not require a finding of maliciousness." *Ibid.* Thus, the court of appeals *rejected* the subjective standard that petitioner claims it adopted. There is no conflict with the other decisions on which petitioner relies. Furthermore, the court of appeals' unpublished and non-precedential decision could not create an inter-circuit conflict in any event. See Pet. App. A29; *Manufacturers' Indus. Relations Ass'n* v. *East Akron Casting Co.*, 58 F.3d 204, 208 (6th Cir. 1995) (unpublished Sixth Circuit decision "has no precedential value").

2. As the basis for his allegation of a circuit conflict, petitioner relies (Pet. 12) on the court of appeals' statement (Pet. App. 35) that the government's ownership theory "was not so clearly defective so as to lead us to suspect that the government was up to something nefarious." That statement addressed petitioner's argument "that the government's prosecution of him

was 'vexatious, frivolous, or in bad faith.'" *Id.* at A34. Therefore, in addition to rejecting petitioner's claim that the government's ownership theory was frivolous for lacking factual or legal merit, the court also was rejecting petitioner's claim that the government's position was "vexatious" or "in bad faith." See *id.* at A33. The court's conclusion that the government's position on ownership of SWR "was not so clearly defective so as to lead us to suspect that the government was up to something nefarious," *id.* at A35, resolved all of those objective and subjective issues collectively. It was not a statement limited to petitioner's assertion that the government's position was frivolous. As noted, the court of appeals had already addressed the correct application of the Hyde Amendment's "frivolous" test, saying that it "appears only to require that the government's position completely lack evidential or legal merit." *Id.* at A33.

3. Petitioner further contends that the government's prosecution in this case "was clearly frivolous, because it was foreclosed by binding precedent." Pet. 15 (internal quotation marks omitted). The court of appeals considered and rejected petitioner's assertion that the government's theories were completely devoid of merit under settled precedent. It determined that the government's ownership theory was not manifestly "defective," Pet. App. A35; that the government's theory about SWR's failure to engage in the claimed line of business was not "patently without merit," *ibid.*; and that the government's theory about salary payments to petitioner's children and other claimed business expenses was not "all that absurd" but, rather, "reasonable," *id.* at A35-A36. Those fact-bound determinations do not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In the

Supreme Court of the United States

RONALD W. SKEDDLE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Ronald W. Skeddle respectfully submits this Reply Brief in further support of his Petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

Argument

The Government's Brief in Opposition misstates the holding of the Sixth Circuit and thereby seeks to obscure the ways in which that court's ruling conflicts with those of other circuits; ignores its own prior precedents, as well as those of this Court; and distorts the plain meaning of the Hyde Amendment (18 U.S.C. §3600A note).

The Hyde Amendment authorizes an award of attorneys' fees to a defendant in a criminal case if the prosecution's position "was frivolous, vexatious, or in bad faith." As is set forth more fully in the Petition, all other circuits to have construed this statute have held that a position is "frivolous" if it is *objectively* without arguable legal merit. *E.g., United States v. Braunstein*, 281 F.3d 982, 995 (9th Cir. 2002); *United States v. Gilbert*, 198 F.3d 1293, 1304 (11th Cir. 1999); Petition 11-13.

In this case, in contrast, the Sixth Circuit added an additional, *subjective* requirement, holding that Mr. Skeddle was not entitled to attorneys' fees, even though the Government attempted to prosecute him on a legal theory which was clearly foreclosed by binding precedent — as a fact of which defense counsel had informed the prosecution at the outset of the case — solely because the Government was not "up to something nefarious." (A35).

The Government now tries to argue that the Sixth Circuit really applied the correct construction of the term "frivolous" and merely used the "nefarious" language to explain why the

prosecution's theory did not fall under the statute's "vexatious" or "bad faith" prongs. (Opp. 7). But this argument ignores the crucial underlying point that the prosecution's theory was, indeed, objectively frivolous. (Petition 15-16).

A legal position is "frivolous" under the Hyde Amendment if it is "foreclosed by binding precedent." *Braunstein*, 281 F.3d at 995; *Gilbert*, 198 F.3d at 1304. The Government does not contend otherwise.

Here, the Government prosecuted Mr. Skeddle under 26 U.S.C. §7206(1), the tax perjury statute, for claiming on tax returns that his children were the owners of a corporation known as SWR. Mr. Skeddle's children were, however, the sole shareholders of SWR. (A22). Accordingly, the tax returns properly named the children as the corporation's owners. *United States v. Pirro*, 212 F.3d 86, 89-91 (2d Cir. 2000) (affirming dismissal of charge under 26 U.S.C. §7206(1)).

Before the trial, counsel for Mr. Skeddle alerted the Government to controlling precedent of this Court and of the Sixth Circuit holding that a charge of perjury or false statements will not lie where the defendant's statements are literally true, even if intended to mislead or conceal. (A22; *see also* Petition 5-7). *E.g., Bronston v. United States*, 409 U.S. 352 (1973); *United States v. Gatewood*, 173 F.3d 983, 988 (6th Cir. 1999).

The Government does not even attempt to argue that Mr. Skeddle's statements were not literally true, or that there was any arguable legal theory that could have supported prosecuting Mr. Skeddle under 26 U.S.C. §7206(1) for making such literally true statements. (*See* Opp. 7). Accordingly, it is indisputable that the prosecution of Mr. Skeddle was "frivolous" within the meaning of the Hyde Amendment.

In light of the indisputable frivolity of the government's position in prosecuting Mr. Skeddle under its "ownership" theory, Mr. Skeddle should have prevailed on his Hyde Amendment motion. He did not prevail because the Sixth Circuit found that while the government's position was foreclosed by binding precedents of both this Court and of the Sixth Circuit, there was nothing "nefarious" about the government's prosecution. The Sixth Circuit's position is, therefore, at odds with both the position of Circuit Courts and the plain language of the Hyde Amendment itself.

CONCLUSION

For the reasons stated above, and in the Petition, the Petition for Writ of Certiorari should be granted.

Dated: February 21, 2003

Respectfully submitted,

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